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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

RICKY L. LUCAS, PETITIONER,

v.

UNITED STATES, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Is a prosecutor's failure to disclose prior involvement with an accused's immunized testimony and withdraw from the case plain error?

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In the Supreme Court of the United States

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No.

RICKY L. LUCAS, PETITIONER,

v.

UNITED STATES, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Ricky L. Lucas respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on September 21, 1987.

OPINIONS BELOW

The decision of the United States Air Force Court of Military Review is reported at 19 M.J. 773 (A.F.C.M.R. 1984) and is reproduced in the appendix to this petition ("Pet. App.") at page 6a. The decision of the United States Court of Military Appeals is reported at 25 M.J. 9 (C.M.A. 1987), Pet. App. 1a.

JURISDICTION

The jurisdiction of this Court is invoked under 10 U.S.C. § 867(h) (Supp III 1985) and 28 U.S.C. § 1259(3) (Supp III 1985). The judgment of the Court of Military Appeals was entered on September 21, 1987.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides:

> No person shall be . . . compelled in any criminal case to be a witness against himself . . . .

STATEMENT OF THE CASE

Petitioner was convicted by an Air Force general court-martial, pursuant to his pleas, of using, possessing and distributing marijuana and using and possessing cocaine. Contrary to his plea, he was convicted of distributing cocaine. His sentence included confinement for three years, forfeiture of $397.00 pay per month for three years, reduction to the lowest enlisted grade and a dishonorable discharge. The court-martial convening authority limited the period of confinement and forfeiture of pay to 32 months.

Captain David Stephenson, the prosecutor at petitioner's trial, also prosecuted a related case in which petitioner testified under a grant of immunity. The accused in the related case, Sergeant Aea, in turn testified at petitioner's trial. Sergeant Aea's trial occurred in November, 1983, and petitioner's trial occurred in April, 1984.

Captain Stephenson prepared petitioner's immunized testimony against Aea and conducted the direct examination of petitioner in Aea's trial. Part of that testimony included petitioner's recitation of events surrounding a trip he took with Aea to Ft. Lauderdale, Florida, which served as the focus for the contested charge. At the very opening of petitioner's trial, the military judge inquired whether either counsel "had functioned in any disqualifying or inconsistent capacity in this case." Captain Stephenson replied, "No." (R. 4). At no point in the record of trial is it disclosed that he advised the military judge or trial defense counsel of his prior involvement with petitioner's immunized testimony.

Captain Stephenson used information from petitioner's prior immunized testimony to bolster Aea's testimony against petitioner and to impeach petitioner and another defense witness. (R. 196, 152-156, 239-258, 302-304). No specific objection or motion was made by the trial defense counsel regarding this improper use. Although the military judge was aware of the use of petitioner's prior testimony, there is no indication he was aware that it was given under a grant of immunity. Nor did he inquire specifically on that point.

The lower appellate courts held that petitioner failed to "demonstrate" that he had previously testified under a grant of immunity, therefore negating any requirement for a *Kastigar* hearing. Nor did the use of the same prosecutor in related cases under the facts presented herein constitute plain error. *United States v. Lucas*, 19 M.J. 773 (A.F.C.M.R. 1984), *aff'd*, 25 M.J. 9 (C.M.A. 1987).

REASONS FOR GRANTING THE WRIT

This case raises an important question regarding a prosecutor's responsibility in handling immunized testimony. Where an accused has been compelled to testify under immunity regarding criminal activity and is later prosecuted for related misconduct, there must be adequate safeguards to preserve his right against self-incrimination. This has been determined to require that once an accused *demonstrates* that he gave prior testimony under immunity on matters related to his own prosecution, the government bears the heavy burden of affirmatively showing that prosecution evidence is untainted and independent of the immunized testimony. *Kastigar v. United States*, 406 U.S. 441 (1972); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

Prosecutions must be carefully planned to insure that an accused and the government remain in substantially the same position had an accused not been compelled to testify prior to his own trial. *See United States v. Thevis*,

665 F.2d 616, n. 26 (5th Cir. 1982) (government must take extra-ordinary steps such as arranging for a new team of prosecutors), *cert. denied,* 459 U.S. 825 (1982); *United States v. Turkish*, 623 F. 2d 769 (2d Cir. 1980) (heavy burden may be met by "cataloging" or "freezing" the evidence known prior to a grant of immunity), *cert. denied,* 449 U.S. 1077 (1981).

There is no indication these or similar safeguards were employed in petitioner's case. On the contrary, it appears that no safeguards were employed to see that petitioner's immunized testimony was isolated from the evidence presented against him. In any event, the government should have been prepared to carry the burden required by *Kastigar* and *Murphy v. Waterfront Commission, supra.*

Two cases help illustrate the extent of the error. In one case, where the trial counsel (an Assistant United States Attorney) had access to the defendant's immunized grand jury testimony, the court remanded for an evidentiary hearing. *United States v. Semkiw*, 712 F.2d 891 (3d Cir. 1983) In the other case, *United States v. Pantone*, 634 F.2d 716, 719 (3d Cir. 1980), appellant argued for "a per se rule, which would require the withdrawal of a prosecutor who may be privy to compelled testimony." The court ruled, however, under the unique facts of the case that it was possible to show the evidence was not tainted. Taken together, these cases highlight the egregious nature of petitioner's case, where the prosecuting attorney had more than access to immunized testimony. He actually called and prepared the petitioner as a government witness when the compelled testimony was given.

For reasons which are not stated in the record, trial defense counsel did not object or otherwise raise the issue. This would arguably constitute waiver. There are federal decisions which have so found and applied the "plain error" analysis in resolving the issue. *See United States v. Brimberry*, 744 F.2d 580 (7th Cir. 1984); *United States v. McDonnel*, 550 F.2d 1010 (5th Cir. 1977), *cert. denied,*

434 U.S. 835 (1977); *United States v. Keilly*, 445 F.2d 1285 (2d Cir. 1971), *cert. denied*, 406 U.S. 962 (1972).

The gravity of the error in petitioner's case is such that if his conviction is allowed to stand, a clearer miscarriage of justice is hard to imagine. Assuming an objection had been made at trial and a *Kastigar* hearing held, it would have been next to impossible, if not impossible, for the government to carry the burden of proof. One Circuit Court of Appeals held that a prosecutor's access to compelled testimony created an insurmountable burden to show an absence of taint. *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973). This holding would appear to justify a finding of plain error, if not the establishment of a per se rule. Finally, it is hard to believe that the government would be overly burdened with a per se rule, while much good would flow from a practice requiring different prosecutors in related cases that involve immunized testimony.

CONCLUSION

Petitioner submits that the prosecutor in his case had an affirmative duty to disclose prior involvement with petitioner's immunized testimony and withdraw from the case, which was not done. Therefore, this petition for a writ of certiorari should be granted.

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Major, OTJAG
United States Air Force

November 1987

APPENDICES

UNITED STATES COURT OF MILITARY APPEALS

No. 51677
ACM 24465

UNITED STATES, APPELLEE

v.

RICKY L. LUCAS, STAFF SERGEANT
U.S. AIR FORCE, APPELLANT

September 21, 1987

COUNSEL

For Appellant: *Colonel Leo L. Sergi* and *Major Conrad C. Baldwin, Jr.* (on brief).

For Appellee: *Colonel Kenneth R. Rengert* and *Lieutenant Colonel Donal F. Hartman, Jr.* (on brief).

OPINION OF THE COURT

EVERETT, Chief Judge:

At his general court-martial by a military judge sitting alone, appellant was convicted, pursuant to his pleas, of use, possession, and distribution of marijuana, and use and possession of cocaine. Also, contrary to his plea, Lucas was convicted of distributing cocaine. These offenses were violations of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. Thereupon, the judge sentenced him to a dishonorable discharge, confinement for 3 years, forefeiture of $397.00 pay per month for 3 years, and reduction to the lowest enlisted grade. The convening authority approved these results, except for con-

finement and forfeitures exceeding 32 months. The Court of Military Review affirmed. 19 M.J. 773 (1984).

We granted review of these issues:

I

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED BY HOLDING THAT APPELLANT HAD NOT ADEQUATELY "DEMONSTRATED" THAT HE HAD BEEN DENIED A FAIR TRIAL WHERE THE SAME DETAILED TRIAL COUNSEL HAD EXAMINED HIM PRIOR TO TRIAL UNDER A GRANT OF TESTIMONIAL IMMUNITY AND THEN CROSS-EXAMINED HIM AT HIS OWN TRIAL ON THE SAME MATTERS.

II

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED BY HOLDING APPELLANT HAD "WAIVED" THE ISSUE OF TRIAL COUNSEL'S IMPROPER USE OF APPELLANT'S PRIOR IMMUNIZED TESTIMONY UNDER MIL. R. EVID. 103(a) AND THAT SUCH AN ISSUE WAS NOT PLAIN ERROR UNDER MIL.R.EVID. 103(d).

III

WHETHER THE MILITARY JUDGE ERRED BY STRIKING THE PARTIAL TESTIMONY OF A DEFENSE WITNESS (VEST) WITHOUT FIRST INVOKING OTHER ALTERNATIVES.

ISSUES I & II

Lucas had testified under a grant of testimonial immunity at the prior court-martial of Sergeant Aea. Captain David Stephenson, the trial counsel in that case, was also the prosecutor at appellant's trial. However, at no time during the trial did either of appellant's military defense counsel voice any objection to Stephenson's participation as trial counsel.

An accused who has testified under a grant of immunity may require the Government to demonstrate that it has

not used information or evidence derived from his immunized testimony. However, as cogently explained by the Court of Military Review, the accused must assert his right in order to place this burden on the Government. Only then must the Government show "that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *United States v. Gardner*, 22 M.J. 28, 30 (C.M.A. 1986), quoting *Kastigar v. United States*, 406 U.S. 441, 460 (1972), which, in turn, quoted *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 n. 18 (1964). Absent some defense complaint, there is no reason to protract a trial by requiring the prosecution to establish a negative—namely, that it has not used information or evidence derived from the accused's immunized testimony.

If the military judge becomes aware that prohibited use is being made of immunized testimony, then he has some duty to intervene. Since both the good faith of the Government and the constitutional rights of an accused are involved, the judge should not invoke the doctrine of waiver; and upon appellate review, Mil.R.Evid. 103(d), Manual for Courts-Martial, United States, 1969 (Revised edition), will apply. However, nothing in this record would have suggested to the military judge—or now demonstrates to us—that the prosecutor utilized appellant's immunized testimony in any way. There is no indication that any of appellant's guilty pleas were induced in any way by prosecutorial use of information derived from appellant's immunized testimony; the questions posed on cross-examination of Lucas when he took the stand in his own defense do not appear to be derived from his earlier testimony at Aea's trial; and all the Government's evidence would apparently have been available without any reliance on appellant's immunized testimony.

Although appellant has not convinced us that he is entitled to relief because of Captain Stephenson's partici-

pation as trial counsel, some further comments are in order. In the first place, while trial counsel was technically correct when, at the outset of the trial, he answered the military judge's query with the assertion that he had not "functioned in any disqualifying or inconsistent capacity in this case," he might better at that time have informed the judge of his earlier role as prosecutor in a trial wherein appellant had testified under an immunity grant. Certainly, the prosecutor should have been aware of the potential issue created by his participation; and prudence would dictate early resolution of such an issue—rather than having it later disrupt the trial or be a ground for appellate review.

Second, the failure of defense counsel to question the prosecutor's participation seems somewhat puzzling in view of the ease with which the defense can place upon the Government the heavy burden of disproving the use of immunized testimony given previously by the accused. Certainly, it is almost inconceivable that neither of the defense lawyers was aware that Captain Stephenson had prosecuted the earlier case in which appellant had testified. Appellant government counsel have insisted that there were logical reasons for the defense failure to contest Captain Stephenson's participation as trial counsel. For example, they contend that, prior to giving immunized testimony, appellant, through his pretrial statements, had already provided the Government ample information about his activities; and so it would have been fruitless for the defense to have raised any issue about misuse of appellant's immunized testimony. Although we can imagine many reasons for defense inaction, none of them is clearly reflected in the record of trial.

Appellate defense counsel have suggested that, absent some explanation for the defense inaction, the specter of ineffective assistance of counsel looms over this case. Nonetheless, appellant has never specifically urged through an appellate assignment of error that trial defense

counsel's failure to challenge Captain Stephenson's participation constituted ineffective assistance of counsel under the circumstances here. Keeping in mind that the burden on an accused of demonstrating such ineffectiveness is substantial, *see United States v. Scott*, 24 M.J. 186, 187-89 (C.M.A. 1987), further speculation by this Court now would serve no useful purpose.*

ISSUE III

Pursuant to Mil.R.Evid. 301(f)(2), the military judge struck part of a defense witness' testimony. The Court of Military Review, for reasons we find convincing, upheld the judge's imposition of this sanction. 19 M.J. at 778-80. Indeed, by striking only part of the testimony, the judge demonstrated his intent to fulfill the purpose of the Rule, as well as his determination to deprive the defense of no more of the evidence it had offered than was necessary to assure fairness to the Government. Appellate defense counsel now suggest alternative remedies, which they insist would have been less drastic and which might have been used by the military judge. However, the time to have urged use of those alternatives would have been in resisting trial counsel's motion to strike, but that was not done. Thus, we fully agree with the court below that the military judge acted properly.

The decision of the United States Air Force Court of Military Review is affirmed.

Judge COX concurs.

Judge SULLIVAN did not participate.

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* Because of the likelihood that the defense failure at trial to assert a claim of misuse of immunized testimony will lead to a later contention that defense counsel was inadequate, a military judge who becomes aware that an accused has previously testified under an immunity grant will be wise to ask the defense whether it wishes to claim use of immunized testimony and then to obtain the accused's concurrence if counsel declines to raise the matter.

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 24465

UNITED STATES

v.

STAFF SERGEANT RICKY L. LUCAS, FR 422-780-8595
UNITED STATES AIR FORCE

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21 DEC. 1984

Sentence adjudged 13 April 1984 by GCM convened at Moody Air Froce Base, Georgia. Military Judge: Andrew C. Pratt (sitting alone).

Approved sentence: Dishonorable discharge, confinement at hard labor for thirty-two (32) months, forfeiture of three hundred ninety-seven dollars ($397.00) per month for thirty-two (32) months and reduction to airman basic.

Appellate Counsel for the Accused: Colonel Leo L. Sergi and Major Conrad C. Baldwin, Jr. Appellate Counsel for the United States: Colonel Kenneth R. Rengert, Major Kevin L. Daugherty, and Major Robert E. Ferencik, Jr.

Before

FORAY, SNYDER and O'HAIR
Appellate Military Judges

DECISION

SNYDER, Judge:

Pursuant to mixed pleas, the accused was convicted by a military judge sitting as a general court-martial of possession, use, and distribution of marijuana and cocaine. The only offense contested by the accused was one specification of distributing cocaine. His sentence extends to a dishonorable discharge, confinement at hard labor for 32 months, and accessory penalties. He has submitted three assignments of error for our consideration. Finding no error prejudicial to the substantial rights of the accused, and finding no manifest miscarriage of justice, we affirm.

An investigation of illicit drug activities in and around Moody Air Force Base, Georgia, identified the accused as a suspect. He was interviewed by Special Agent Law of the Air Force Office of Special Investigations (OSI) on 13 October 1983. During that interview, the accused admitted to his illicit possession, use, and distribution of marijuana, and his possession and use of cocaine. In addition to executing a written confession, the accused agreed to cooperate with OSI in identifying others involved with drug abuse activities.

The accused apparently extended his cooperation without benefit of any type of immunity until 17 November 1983. It appears that he was involved as a witness in *United States v. Aea* when he requested immunity prior to providing further cooperation. The Commander, Ninth Air Force, granted testimonial immunity on 17 November 1983.

Charges were preferred against the accused on 12 January 1984, investigated pursuant to Article 32 on 20 January 1984, and referred for trial by general court-martial on 25 February 1984. His trial took place on 12 and 13 April 1984. The trial counsel, Captain S, was also the trial counsel in *United States v. Aea*. As a result of these events, one of the assignments of error is that the

accused was denied a fair trial by virtue of trial counsel's involvement in *Aea*, and the "use" he made of the accused's immunized testimony in the accused's trial.

After reviewing the assignments of error and the Government's reply, we granted oral argument and specified the following issue:

> WHETHER THE ISSUE OF IMPROPER USE OF IMMUNIZED TESTIMONY MAY BE WAIVED UNDER THE PROVISIONS OF MIL. R. EVID. 103(a); OR, IS THE ISSUE SUBJECT TO THE PROVISIONS OF MIL. R. EVID. 103(d).

I

The key salient fact of this case is that trial defense counsel did not raise the issue at trial. Consequently, there was no evidentiary hearing at which the Government could have endeavored to demonstrate that its evidence was independent of and untainted by the accused's immunized testimony. *See United States v. Whitehead*, 5 M.J. 294 (C.M.A. 1978); *United States v. Rivera*, 1 M.J. 107 (C.M.A. 1975). Thus, the issue is being raised for the first time on appeal.

Initially, we note that there was not anything at trial which should have put the military judge on notice that an evidentiary hearing was in order. *Cf. United States v. Whitehead* , *supra*, n. 9 and 11. The references to the accused having testified in *United States v. Aea* were vague and cryptic, and there was no indication that he had testified pursuant to immunity.

It was in *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964), that the Supreme Court promulgated the threshold test for raising the issue of derivative use of immunized testimony. All an accused need do is "*demonstrate* that he gave testimony under immunity on matters related to his own prosecution." *Murphy v. Waterfront Comm'n*, *supra* at 79 n. 18, 84 S.Ct. 1609 n. 18, 12 L.Ed.2d 695 n. 18. Once that is done, the

Government must affirmatively show that its evidence is untainted and independent of the immunized testimony. *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972); *Murphy v. Waterfront Comm'n*, *supra*; *United States v. Rivera*, 1 M.J. 107 (C.M.A. 1975); *United States v. Gardner*, 18 M.J. 612 (A.F.C.M.R.), *pet. granted*, 19 M.J. __ (1984).

For our purposes, the key word is "demonstrate." Appellate defense counsel are well aware of their quandry; as a result, they argue that the demonstration need not occur in the courtroom. Their argument urges that the chain of command's awareness of the accused's previous grant of testimonial immunity prior to referring the case to trial satisfies the demonstration requirement, and that the Government's burden, in effect, exists prior to entering the courtroom.

The end result of this argument, notwithstanding appellate defense counsel's refusal to concede such, is that the *Murphy/Kastigar* rule would become self-executing. We reject this argument and hold that the *issue must be raised at the trial level* by defense counsel in order to key the Government's burden.

The very wording of the test leads to the conclusion that the defense must raise the issue in order to pit the Government against its heavy burden. If there is any uncertainty after reading the threshold test, it is dispelled by the concurring opinion in *Murphy* and subsequent explanation in *Kastigar v. United States*, *supra*. Mr. Justice White elaborated on the test promulaged in *Murphy v. Waterfront Comm'n*, and emphasized its similarity to other constitutional violations. He stated as follows:

> As in the analogous search and seizure and wiretap cases where the burden of proof is on the Government once the defendant establishes the unlawful search and wiretap, [citations omitted] *once a defendant demonstrates* that he has testified . . . in exchange

> for immunity . . . the Government *can be put to show* that its evidence is not tainted . . . (Emphasis added).

Murphy v. Waterfront Comm'n, *supra* at 103 (White, J., concurring).

In *Kastigar*, the Court chose to use the coerced confession rule as its analogy, but it retained the same threshold by stating as follows:

> *One raising a claim under this statute need only show* that he testified under a grant of immunity in order to *shift* to the Government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources. (Emphasis added).

Kastigar v. United States, *supra* at 461-462. The Court emphasized the extreme advantage enjoyed by a previously immunized defendant by advising that unlike those who claim a confession was coerced, the immunized defendant need not *prove* his testimony was used. All he need do is *claim* that it was.[1]

It is more than fair to infer that the Supreme Court was aware that the Government would know before trial that the defendant had previously testified under immunity. Nevertheless it chose to use terms such as "the defendant must demonstrate," and "put the Government to show," and "shift to the Government." It would have been quite simple for the Court to instruct that the Government will put the trial court on notice of prior immunized testimony in all cases. Not having done so, we must conclude that the defense must at least inform the trial court of prior immunized testimony by the accused. In adopting the rule for trials by court-martial, the Court of Military Appeals

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[1] In military practice the burden of proof is always on the prosecution, even on motion to suppress. However, the defense is still required to key the burden via a motion to suppress or other objection. Mil. R. Evid. 304(d).

did not indicate a stricter standard. *See United States v. Whitehead*; *United States v. Rivera*, both *supra*.

Appellate defense counsel, however, urge that the issue is one of constitutional dimension; and, as such, it may be raised for the first time on appeal. We disagree.

A constitutional right may be waived for appellate review if not raised at the proper time. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143, 87 S.Ct. 1975, 1985, 18 L.Ed.2d 1094, 1104 (1966); *United States v. Sloan*, 22 U.S.C.M.A. 587, 48 C.M.R. 211 (1974). This is especially so in the face of a guilty plea which admits the facts on which the constitutional right claimed to be violated is based.[2] *United States v. Hamil*, 15 U.S.C.M.A. 110, 35 C.M.R. 82 (1964); *United States v. Leong*, 47 C.M.R. 464 (A.F.C.M.R.), *pet. denied*, __ C.M.R. __ (1973); *see United States v. Stewart*, 20 U.S.C.M.A. 272, 43 C.M.R. 112, 114 (1971).

The prohibition against the use of immunized testimony is co-extensive with the right against self-incrimination. *Kastigar v. United States*; *United States v. Rivera*, both *supra*. As such, "Immunity must be as broad as, but not harmfully and wastefully broader than the privilege against self-incrimination." *Murphy v. Waterfront Comm'n*, *supra* at 107 (White, J., concurring). Like other constitutional violations, *e.g.*, improper searches, a violation of the right against self-incrimination may be waived for appellate review by a failure to object. *United States v. Gross*, 14 U.S.C.M.A. 660, 34 C.M.R. 440 (1964); *United States v. Dial*, 9 U.S.C.M.A. 700, 26 C.M.R. 480 (1958); *see United States v. Caiola*, 18 U.S.C.M.A. 336, 40 C.M.R. 48 (1969). The same rule holds true for objections to derivative evidence. *See United States v. Dial*, *supra*. If an objection based on a violation of the right against self-

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[2] As mentioned, the accused pled guilty to all but one of the charged offenses.

incrimination and derivative evidence therefrom is not interposed at trial, it is waived. Mil. R. Evid. 304(d)(2), and (e).

Unless the Court of Military Appeals clearly adopts or imposes a stricter standard on courts-martial,[3] our review of the precedents convinces us that the issue must be raised by the defense. Having failed to do so in the instant case, the issue may be waived under M.R.E. 103(a).

II

We now consider whether we should take action under M.R.E. 103(d), the absence of an objection notwithstanding. Rule 103(d) states as follows:

> *Plain error.* Nothing in this rule precludes taking notice of plain errors that materially prejudice substantial rights although they were not brought to the attention of the military judge.

The plain error rule is an exceptional remedial measure which should be used only in exceptional circumstances to prevent great miscarriages of justice. Thus, courts must exercise restraint in using it. *United States v. Bolden*, 16 M.J. 722 (A.F.C.M.R. 1983), and cases cited therein.

Appellate defense counsel argued impassionately that this accused was denied his due process rights to a fair trial in all respects. Appellate defense counsel repeatedly urged that the instant case is a clear example of the Government "having its cake and eating it too." The justification constantly alluded to was the ubiquitous involvement of trial counsel, Captain S. Considering our adversary criminal system of justice, appellate defense counsel's indignation is somewhat understandable. As a substantive matter,

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[3] *United States v. Gardner*, 18 M.J. 612 (A.F.C.M.R.), *pet. granted*, 19 M.J. __ (1984) is presently pending before the Court of Military Appeals. Until its decision, however, we will adhere to precedents presently applicable.

however, the facts just do not support their premise that the accused was denied a fair trial.

Initially, we do not speculate what subjective impact the accused's immunized testimony had on trial counsel, for that is a proper matter for an evidentiary hearing.[4] Since we are assessing for plain error, we look to the record.

In order for appellate defense counsel's argument to have substance, one must ignore the fact that the Government had marshalled a substantial case against the accused prior to the grant of testimonial immunity. Therefore, this is not a case where the Government blatantly used the power of testimonial immunity as an investigative tool to sift through suspects. *See United States v. Rivera*, *supra*. If so, the case could very well rise to the level of plain error. *United States v. Bolden*, *supra*. Likewise, there is no indication that the "subjective use" by trial counsel, via his presence, intimidated the accused into pleading guilty or from testifying in his own behalf.

Prior to the accused's request for and the grant of testimonial immunity, he had tendered his cooperation in exchange for nothing more than the hope for leniency, because he knew the Government "had the goods on him." We view that factor as the moving force behind his guilty plea rather than his having testified under immunity. Second, the accused's testimony at trial tracked consistently with his confession. He steadfastly denied knowing that Aea was going to Fort Lauderdale, Flordia to procure cocaine until after the trip was accomplished.[5] Conse-

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[4] Appellate government counsel's Motion For Leave To File Affidavit is hereby DENIED.

[5] The Government's theory on this charge of distributing cocaine was that the accused aided and abetted Aea's trip to Fort Lauderdale, Florida to procure cocaine for distribution back at Lowndes County, Georgia. Therefore, if the accused's denial of knowledge as to Aea's purpose for the trip is believed, he could not have aided and abetted.

quently, it does not appear that the accused was intimidated by the knowledge that Captain S had taken his testimony at Aea's trial as well as having interviewed him, thereby giving the Government an advantage it would not have otherwise enjoyed.[6]

As mentioned, the accused was represented by counsel through this sequence of events. We have good reason to infer that trial defense counsel was knowledgeable of the ramifications of his client testifying pursuant to a grant of testimonial immunity. In fact, his advice to the accused was to exercise caution even in the face of the grant of testimonial immunity. During his testimony, the accused stated as follows:

A. I had a conference with my attorney and he advised me not to say anything I hadn't already said.

Q. . . . When was this conference . . . ?

A. It was around the 15th of November 1983.

Having weighed all of these factors, we find that this case fails to rise to the level of plain error which materially prejudiced the substantial rights of the accused. To make

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[6] Appellate defense counsel also averred that the trial counsel, Captain S, was disqualified to act in the accused's trial as a result of his involvement with handling the accused's immunized testimony in *United States v. Aea*, and that Captain S had an affirmative duty to disclose his disqualification. The argument assumes that Captain S was, in fact, disqualified, the he knew or should have known he was disqualified, and his failure to inform the court substantially prejudiced the accused. Trial defense counsel was fully aware of Captain S' involvement, and raised no objection to his acting as trial counsel. Second, as the precedents presently stand, there is no *per se* rule of disqualification for one who has had access to immunized testimony, although that may be one way of removing a possible taint. *See United States v. Gardner*, *supra* n. 9. Third, the accused was represented by his own counsel; thus, he was not misled into possibly concluding that he could safely divulge confidences to Captain S. Under these circumstances, there is no need to disregard the failure to object. *But see United States v. Stringer*, 4 U.S.C.M.A. 494, 16 C.M.R. 68 (1954); *United States v. Fowler*, 6 M.J. 501 (A.F.C.M.R. 1978).

it perfectly clear, we *do not condone* the manner in which the accused's case was handled. Nonetheless, our review of the record leaves us convinced that the accused was not denied a fair trial; *ergo*, relief under M.R.E. 103(d) is not appropriate.

There has been a marked increase in the use of immunized testimony since *United States v. Newman*, 14 M.J. 474 (C.M.A. 1983). Consequently, it is imperative that staff judge advocates, especially those to general court-martial convening authorities, be completely attuned to the ramifications of granting testimonial immunity to a potential accused prior to that accused's own trial. All concerned must realize that the grant of testimonial immunity will completely change the complexion of the immunized witness' subsequent trial, for much will be required of the Government if the issue is raised.

We are disturbed by the apparent unawareness of those responsible for administering the instant case. The instant case was tried prior to our decision in *United States v. Gardner, supra*. We recommend a review of our comments therein. *United States v. Gardner, supra* n. 10.

III

The second part of this assignment of error is that the Government made improper use of the accused's suppressed confession. We fail to see any merit to this assertion. The confession was admitted into evidence over timely objection after the accused's testimony on the merits. The trial judge stated specifically that he was admitting it as a prior inconsistent statement. Since the confession was suppressed due to a defect in the advice to counsel, it was fully admissible for impeachment purposes. M.R.E. 304(b). Second, the accused's testimony included substantially all of the information which the confession contained, thereby providing a judicial confession. We fail to discern any prejudice to the accused.

IV

Appellate defense counsel also aver that the trial judge erred by striking the partial testimony of a defense witness without first invoking other remedies. We disagree.

Trial defense counsel called Airman Vest for the purpose of proving Aea's motive for bias against the accused. M.R.E. 608(c). Although there were some attempts by Vest to exercise her right against self-incrimination during direct examination, trial defense counsel was successful in eliciting the desired evidence. Trial counsel, however, was not as successful on cross-examination. As a result, the trial judge granted, in part, trial counsel's motion to strike Vest's testimony. The trial judge ruled that he would disregard Vest's testimony as it related to her claim that Aea said he could testify to drug matters that never occurred, but the accused could never contradict them or prove he (Aea) was lying; and, Vest's testimony that Aea called another individual and asked that person to take care of the accused, which she interpreted as a request to do bodily harm to the accused.

We need not decide whether the trial judge should have taken other alternatives, for the record amply demonstrates that the accused was not denied the evidence he sought. *See United States v. Richardson*, 15 M.J. 41 (C.M.A. 1983).

Aea testified against the accused. Portions of his cross-examination proceeded as follows:

Q. Now, you were about to be discharged before your court-martial, is that correct?
A. Separated.
Q. At the expiration of your term of service?
A. 5 November '83.
Q. And how many days before your separation did you come under investigation?
A. Approximately 25 days.
Q. And that stopped you from leaving, didn't it?

A. Yes sir.
Q. And that made you pretty mad, didn't it?
A. Yes sir.
Q. In fact, you're still mad about it, aren't you?
A. It wore off.
Q. Now, the main witness in your trial was Sergeant Lucas, wasn't it?
A. Yes sir.
Q. And isn't it true that in your opinion if Sergeant Lucas had not come forward, you would not have been court-martialed?
A. Yes sir.
Q. And that if it had not been for Sergeant Lucas, your case wouldn't have gone to trial?
A. Yes sir.
Q. And if it weren't for Sergeant Lucas, no one would have found out about you.
A. They knew about me but I don't think they had enough on me.
Q. So you were pretty mad about having that happen and to be court-martialed and to stick around, wouldn't you?
A. Yes sir.
Q. Isn't it true that while you were in jail, you had a lot of thoughts about how you were going to get back at Sergeant Lucas?
A. Yes sir.
Q. After you got out of jail, you called Tony Lombard on the phone, didn't you?
A. No sir.
Q. Before, I'm sorry, before you went to jail you called Tony Lombard, didn't you?
A. Yes sir.
Q. And you talked about your case, didn't you?
A. Yes sir.

Q. Do you know anything about Tony Lombard's family?
A. No sir.
Q. And isn't it true that during the phone call, you asked Tony Lombard to take care of Sergeant Lucas?
A. No sir.
Q. Didn't you express to him your anger against Sergeant Lucas?
A. Yes sir.
Q. Didn't you express to him that you wished there could be something done about it?
A. No sir. I just told him I was in trouble.
Q. And isn't that true that you decided you would get even with Sergeant Lucas after the trial?
A. By testifying against him.
Q. And isn't it true that you didn't want to just get even, you wanted revenge?
A. No sir.
Q. Isn't it true that you told people you were going to put him away?
A. In jail, yes sir.
Q. Now you made a statement to the OSI about Lucas, didn't you?
A. Yes sir.
Q. That statement was made while you were in jail, wasn't it?
A. Yes sir.
Q. And your testimony today is part of your plan to get even with Lucas, isn't it?
A. Yes sir.
Q. And you are not opposed to exaggerating in order to take care of that, are you?
A. No sir. Excuse me?
Q. And isn't it a fact that you told—
TC Excuse me. I'm sorry, Your Honor. I think the witness has some confusion about that last question.

MJ You'll have an opportunity for redirect.
TC Very well, Your Honor.
DC Airman Aea, isn't it a fact that you told Kathy Vest that Lucas was not selling the marijuana or the cocaine but he wouldn't be able to prove it.
A. No sir.

Under these circumstances, Aea's potential bias was fully litigated. The factfinder had more than adequate evidence on which to fully assess Aea's worthiness of belief.[7] The accused suffered no prejudice.

We have considered the remaining assignment of error and find it to be without merit.

IV

The findings of guilty and the sentence are AFFIRMED.

FORAY, Senior Judge, and O'HAIR, Judge, concur.

OFFICIAL

/s/ CHARLES L. WILLE
Charles L. Willie
Captain, USAF
Chief Commissioner

[7] The record clearly indicates that trial defense counsel was aware of the potential problems with eliciting Vest's testimony well before trial. The difficulty at trial may have been avoided had trial defense counsel requested testimonial immunity for her prior to trial. *See United States v. Villines*, 13 M.J. 46 (C.M.A. 1982).

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No. 87-823

In the Supreme Court of the United States

OCTOBER TERM, 1987

RICKY L. LUCAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government was required to establish an independent source for the evidence against petitioner notwithstanding petitioner's failure at trial to demonstrate that he had previously testified under a grant of use immunity about matters that were related to his subsequent prosecution.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-5a) is reported at 25 M.J. 9. The opinion of the Air Force Court of Military Review (Pet. App. 6a-19a) is reported at 19 M.J. 773.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 21, 1987. The petition for a writ of certiorari was filed on November 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Following a general court-martial before a military judge at Moody Air Force Base in Georgia, petitioner, a member of the United States Air Force, was convicted of the use, possession, and distribution of marijuana and

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cocaine, in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934.[1] He was sentenced to three years' confinement, a dishonorable discharge, forfeitures of pay, and reduction in rank. The convening authority reduced the period of confinement and forfeitures to 32 months, but otherwise approved the findings and sentence.[2] Pet. App. 1a-2a. The Air Force Court of Military Review affirmed the findings and sentence (*id.* at 6a-19a). The Court of Military Appeals affirmed (*id.* at 1a-5a).

1. In 1983, petitioner became a suspect in an investigation of drug activities in and around Moody Air Force Base in Georgia (Pet. App. 7a-8a, 13a n.5). On October 13, petitioner gave a statement (PX 1) to Special Agent Law of the Air Force Office of Special Investigations (OSI) in which petitioner admitted to the possession, use, and distribution of marijuana, and to the possession and use of cocaine (*id.* at 7a). Petitioner also agreed to help the OSI identify other persons involved in drug activities. This cooperation continued until November 17, when petitioner sought use immunity before testifying as a potential prosecution witness in the case of *United States* v. *Aea.* The Commander of the Ninth Air Force (the convening authority in both Aea's and petitioner's trials), granted petitioner use immunity that day, and petitioner testified at Aea's trial (Pet. App. 7a).

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[1] Prior to August 1, 1984, drug offenses in the military were prosecuted and punished under Article 134, which is known as the General Article. Such offenses are now prosecuted under Article 112a, UCMJ, 10 U.S.C. (Supp. IV) 912a[redacted], which was added to the UCMJ by Section 8(a) of the Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1403. Petitioner's case was tried in April 1984 under Article 134.

[2] Under Article 60(c)(2), UCMJ, 10 U.S.C. (Supp. IV) 860(c)(2), the convening authority in his or her sole discretion may approve, disapprove, commute, or suspend the sentence in whole or in part. The convening authority may not increase the sentence. Para. 88a, *Manual for Courts-Martial, United States – 1969 (rev. ed.).*

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2. Petitioner's trial took place on April 12 and 13, 1984. The prosecutor, Captain Stephenson, was also the prosecutor in the *Aea* case (Pet. App. 7a). Neither petitioner, his attorneys, nor Captain Stephenson informed the trial judge of Stephenson's involvement in the *Aea* case, nor did petitioner allege or demonstrate that he had testified in that case under a grant of use immunity about matters relating to his subsequent prosecution (Tr. 4, 15-81).[3] Petitioner thereafter entered guilty pleas to specifications one through five of the charge, and a not guilty plea to specification six (Tr. 82). After a hearing, the trial judge accepted petitioner's guilty pleas and entered findings of guilty on the first five specifications (Tr. 97-98). The remainder of the trial was devoted to the last specification, number six, which alleged that petitioner had wrongfully distributed cocaine. At no time was any information adduced to put the trial judge on notice that petitioner had testified under a grant of immunity in the *Aea* case (Pet. App. 8a).

3. On appeal to the Air Force Court of Military Review, petitioner claimed for the first time that Stephenson's involvement in his trial constituted an impermissible derivative use of his prior immunized testimony (Pet. App. 7a-8a). The court held that petitioner waived his claim by failing to demonstrate at trial that his prior immunized testimony related to his later prosecution. The court also held that Stephenson's participation in peti-

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[3] The defense did move, without opposition, to dismiss specifications seven, eight and nine of the charge, on the ground that they were barred by the statute of limitations, and the trial judge granted the motion (Tr. 15). The judge also granted petitioner's motion to suppress his confession (PX 1), on the ground that it was obtained after an improperly induced waiver of his right to counsel (Tr. 81). Petitioner's confession was subsequently admitted as a prior inconsistent statement, however (Tr. 279). Petitioner does not challenge that ruling in this Court.

tioner's trial did not constitute plain error. *Id.* at 12a, 14a. The Court of Military Appeals affirmed (*id.* at 1a-5a). It held that the government is not required to establish an independent source for its proof in the absence of a defense claim that the government's evidence was derived from the defendant's prior immunized testimony. The court also found no plain error in this case (*id.* at 3a).

ARGUMENT

Petitioner argues that his convictions must be set aside because of the prosecutor's failure to disclose his involvement in the *Aea* prosecution, at which petitioner testified under a grant of use immunity. The prosecutor's failure to withdraw from this case requires reversal, petitioner contends, despite petitioner's failure to raise that claim in a timely manner before or at trial. That claim does not warrant review by this Court, for several reasons.

Petitioner has waived his claim, in two ways. Petitioner pleaded guilty to five specifications of the narcotics charge, both military appellate courts found that his pleas were not induced by the prosecutor's use of his prior testimony (Pet. App. 3a, 13a), and petitioner makes no such claim in this Court. Accordingly, petitioner has waived any claim that the government made any improper use of his immunized testimony in connection with those specifications. *Tollett* v. *Henderson*, 411 U.S. 258 (1973) (a voluntary guilty plea waives claims of antecedent constitutional violations).

Petitioner failed to raise his Fifth Amendment claim in connection with the sixth specification. The military rules of procedure require a defendant to raise a Fifth Amendment objection to the government's evidence before he enters his plea, and the failure to do so constitutes a waiver of the claim absent "good cause" to excuse the default. Mil. R. Evid. 304(d)(2) and (e). The military courts have consistently held that objections based on an alleged vio-

lation of the Fifth Amendment privilege against compulsory self-incrimination may be waived by failing to object in a timely manner.[4] Petitioner should have asserted his claim that the prosecutor knew about petitioner's testimony in the *Aea* case before petitioner entered his not guilty plea to the sixth specification. Petitioner has therefore waived his claim absent good cause for his default, which petitioner has neither shown nor alleged in this Court.[5] Under these circumstances, petitioner cannot invoke the Fifth Amendment to challenge the government's proof of the last specification at trial.

In *Kastigar* v. *United States,* 406 U.S. 441 (1972), the Court upheld the constitutionality of the federal use immunity statute, 18 U.S.C. 6002, against the challenge that the statute violated the Fifth Amendment privilege against compulsory self-incrimination. The Court ruled that compelling testimony under a grant of use immunity is consistent with the Fifth Amendment privilege as long as the immunity is coextensive with the scope of the privilege. 406 U.S. at 453-459. In rejecting the claim that use immunity could never be coextensive with the Fifth Amendment privilege because of the difficulty of identifying "the subtle ways in which the compelled testimony may disadvantage a witness" (*id.* at 459), the Court held that once a defendant demonstrates that he testified under a grant of

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[4] *E.g., United States* v. *Yarborough,* 18 M.J. 452 (C.M.A. 1984); *United States* v. *Cross,* 14 C.M.A. 660, 34 C.M.R. 440 (1964); *United States* v. *Dial,* 9 C.M.A. 700, 26 C.M.R. 480 (1958).

[5] The Court of Military Appeals found it "almost inconceivable" that petitioner's defense attorneys were unaware that Stephenson prosecuted the *Aea* case (Pet. App. 4a), and the court of military review believed that petitioner's lawyers were "fully aware" of Stephenson's participation in that case (*id.* at 14a n.6). Petitioner candidly admits (Pet. 4) that the record does not reveal why he did not raise this issue at trial, and he offers no excuse for his default.

immunity about matters that are related to his subsequent prosecution, the burden shifts to the government to prove that the evidence it proposes to use was derived from legitimate, independent sources (*id.* at 460-462).

In *Pillsbury Co.* v. *Conboy,* 459 U.S. 248 (1983), the Court reiterated its ruling in *Kastigar* that the defendant bears the burden of establishing that he previously testified under a grant of use immunity about matters related to his prosecution before the government must establish an independent source for its evidence. As the Court put it, "once a defendant establishes that he has testified under a grant of immunity, 'the prosecution [has] the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony' " (*Conboy*, 459 U.S. at 255 (quoting *Kastigar,* 406 U.S. at 460)). In sum, there is little room for doubt that the mere fact that the defendant previously testified under immunity is not sufficient without more to require the prosecution to bear the heavy burden under *Kastigar* of establishing an independent source for its evidence. As the Court of Military Appeals correctly summarized (Pet. App. 3a), "[a]bsent some defense complaint, there is no reason to protract a trial by requiring the prosecution to establish a negative—namely, that it has not used information or evidence derived from the accused's immunized testimony."

That conclusion is consistent with the decisions of the other federal courts of appeals. Those courts have ruled that Fifth Amendment claims like petitioner's are deemed to be waived if the defendant fails to object at trial on the ground that he previously gave immunized testimony about matters related to his prosecution. *United States* v. *McDonnel,* 550 F.2d 1010, 1011-1012 (5th Cir.), cert. denied, 434 U.S. 835 (1977); *United States* v. *Keilly,* 445 F.2d 1285, 1287-1288 (2d Cir. 1971), cert. denied, 406 U.S. 962 (1972); cf. *United States* v. *Brimberry,* 744 F.2d

580, 584-585 (7th Cir. 1984). Petitioner has cited no decision to the contrary.[6]

Petitioner contends (Pet. 5) that Captain Stephenson's participation in the trial was plain error. The courts below found no basis for concluding that the government's proof that petitioner distributed cocaine was derived from petitioner's testimony in the *Aea* case, rather than from other sources (Pet. App. 3a, 13a), and petitioner does not challenge that conclusion. Instead, he urges the Court to adopt a per se rule forbidding a prosecutor from participating in a case once he has been exposed to a defendant's prior immunized testimony. There is no reason to assume that a prosecutor can never demonstrate that the government's proof stems from an independent source, however, and other federal courts have ruled that the prosecutor's access to the defendant's immunized grand jury testimony does not prevent the government as a matter of law from carrying its burden under *Kastigar. United States* v. *Pantone,* 634 F.2d 716, 720 (3d Cir. 1980); *In re Grand Jury (Vigil),* 524 F.2d 209, 219-220 (10th Cir. 1975), cert. dismissed, 425 U.S. 927 (1976). Petitioner's claim therefore warrants no further review.

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[6] None of the cases cited by petitioner involved the situation in this case, in which the defendant failed to raise the Fifth Amendment issue in the district court by asserting that his immunized testimony was being used against him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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